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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

JAMES E. ZOMBRO,

Petitioner,

v.

BALTIMORE CITY POLICE DEPARTMENT,
and
COMMISSIONER, BALTIMORE CITY POLICE
DEPARTMENT,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF TO PETITION FOR WRIT OF CERTIORARI IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

May an equal protection claim be asserted pursuant to 42 U.S.C. §1983 with respect to a matter for which the Congress has provided a comprehensive, statutory remedial framework?

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF QUESTION PRESENTED.....i

OPINION BELOW.....1

COUNTERSTATEMENT OF THE CASE.....2

ARGUMENT:

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD NOT BE GRANTED BECAUSE THE DECISION OF THE FEDERAL COURT OF APPEALS FOR THE FOURTH CIRCUIT WAS MADE IN CONFORMITY WITH DECISIONS OF THE SUPREME COURT AND OTHER FEDERAL COURTS OF APPEAL IN THAT WHEN A COMPREHENSIVE REMEDIAL FRAMEWORK IS ESTABLISHED BY CONGRESS, IT WILL BE THE REMEDY FOR THE PLAINTIFFS NOTWITHSTANDING CONSTITUTIONAL CLAIMS.....4

II. THE PETITION FOR WRIT OF CERTIORARI SHOULD NOT BE GRANTED BECAUSE THE DECISION OF THE FEDERAL COURT OF APPEALS FOR THE FOURTH CIRCUIT WAS MADE IN ACCORDANCE WITH EXISTING STATUTES AND MERELY AFFIRMED THE CASE LAW EXISTING AT THE

Page

DISTRICT LEVEL.....10

CONCLUSION.....14

TABLE OF AUTHORITIES

Cases:

Christie v. Marston,451 F.Supp. 1142 (N.D.Ill. 1978).....11

Frye v. Grandy, 625 F.Supp. 1573 (D.Md. 1986).....11

Lerwill v. Inflight Motion Pictures, Inc., 343 F.Supp. 1027 (N.D. Calif. 1972).....12

McCroan v. Bailey, 543 F.Supp. 1201 (S.D.Ga. 1982).....11

Middlesex City Sewerage Authority v. National SeaClammers, 453 U.S. 1 (1981).....5

Morgan v. Humboldt County School District, 623 F.Supp. 440 (D.Nev. 1985).....11

Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981).....5

Platt v. Burroughs Corp., 424 F.Supp 1329 (E.D.Pa. 1976).....11

Ring v. Crisp County Hospital Authority, 652 F.Supp. 477

Page

(M.D.Ga. 1987).....11

Vance v. Bradley, 440 U.S. 93(1979)....7

Statues:

22 U.S.C. § 1002 (1982).....7

29 U.S.C. § 201, et seq.
(FLSA) (1982).....12

29 U.S.C. § 621, et seq. ("ADEA")
(1982)..... passim

29 U.S.C. § 626(b) (1982).....12

42 U.S.C. § 1983 (1976)..... passim

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OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1a-29a) is reported at 868

F.2d 1364. The Court of Appeals denied Zombro's petition for rehearing in banc (Pet. App. 36a) on April 20, 1989.

COUNTERSTATEMENT OF THE CASE

On July 15, 1986, Officer James Zombro filed a Complaint in the United States District Court For the District of Maryland, alleging a cause of action under 42 U.S.C. §§ 1981, 1983 and 1985. Zombro's Complaint was that he was transferred from one assignment (Inner Harbor, Tactical Division) to a different assignment (Northeastern District) because of his age. On September 3, 1986, in response to Respondents' Motion For Summary Judgment, Petitioner conceded he had no claim under § 1981.

On October 22, 1986 the District Court granted Respondents' Motion For

Summary Judgment. The District Court in its Memorandum stated: "It is established that neither Section 1983 nor Section 1985 provides an independent remedy for rights created by Title VII of the Age Discrimination in Employment Act." (Pet. App. 30a). (Citations omitted). The District Court also held that the Petitioner did not allege sufficient facts to state a cognizable equal protection claim. (Pet. App. 34a).

On March 2, 1989, the Fourth Circuit affirmed the decision of the District Court. The Fourth Circuit also held that Petitioner was required to seek redress for his Complaint under ADEA and that he did not state a § 1983 Complaint. (Pet. App. 11a).

On March 16, 1989, Petitioner filed

a Suggestion For Rehearing In Banc. An Order denying the Suggestion was entered on April 20, 1989.

ARGUMENT

I.

THE PETITION FOR WRIT OF CERTIORARI SHOULD NOT BE GRANTED BECAUSE THE DECISION OF THE FEDERAL COURT OF APPEALS FOR THE FOURTH CIRCUIT WAS MADE IN CONFORMITY WITH DECISIONS OF THE SUPREME COURT AND OTHER FEDERAL COURTS OF APPEAL IN THAT WHEN A COMPREHENSIVE REMEDIAL FRAMEWORK IS ESTABLISHED BY CONGRESS IT WILL BE THE REMEDY FOR THE PLAINTIFFS NOTWITHSTANDING CONSTITUTIONAL CLAIMS.

The Petitioner carefully frames his assertions to be in conformance with Rule 17 of this Court's rules. Petitioner asserts the decision below was in conflict with this Court, the Fourth Circuit which rendered the decision, and other circuits.

Petitioner also claims the Fourth Circuit's decision was erroneous. Petitioner's claim has no merit.

The preemption of a comprehensive statutory scheme by § 1983 was addressed by this Court in Middlesex City Sewerage Authority v. National Sea Clammers, 453 U.S. 1 (1981). In Middlesex, this Court advised that where a comprehensive remedial framework was established, it could not be circumvented by using § 1983 instead.

This Court also indicated in Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981), that a statute with a comprehensive remedial scheme will preempt a § 1983 cause of action.

Petitioner seeks to make an end run around ADEA. The Fourth Circuit's

decision merely instructs the Petitioner that he must use the statutorily prescribed remedial framework that was set up for his benefit. The decision below is thus in harmony with this Court's decisions.

Petitioner asserts a claim using a fourteenth amendment equal protection analysis. The asserted constitutional violation is based solely on a non statutory generic equal protection claim. Petitioner does not assert that any particular statute is unconstitutional. The alleged violation is based on a personnel action by the Respondent.

The Petitioner first claims that the decision below conflicts with the principles essential to decisions by this Court. The Petitioner finds one

case to support his claim. That case is distinguishable from the issue presented by Petitioner in this case.

Petitioner cites Vance v. Bradley, 440 U.S. 93 (1979), in which a fifth amendment equal protection challenge was made against Section 632 of the Foreign Service Act of 1946, as amended, 22 U.S.C. §1002. The Foreign Service Act mandated retirement at age sixty for certain employees. The Appellee's contentions in Vance were aimed at the Foreign Service Act which was controlling, not the ADEA. In fact, ADEA was not an issue in Vance. Vance was predicated upon a separate statutory provision for foreign service workers that was established to cover the alleged violation. No statute has been challenged by the Petitioner in this

case.

No conflict exists between Vance and the Fourth Circuit's decision below. The constitutionality of ADEA was not an issue in Vance, and is not an issue in this case.

Petitioner also asserts the decision of the Fourth Circuit below is in conflict with other decisions of that Court. To bolster his assertion that the Fourth Circuit is in conflict with itself, Petitioner analyzed two cases and concluded that the court did not hold that a §1983 claim was preempted. The Fourth Circuit never addressed the issue of preemption in the cases that Petitioner cited. The decision below is the only case ever decided by the Fourth Circuit that deals with the issue of ADEA and §1983 preemption.

The decision by the Fourth Circuit to deny Petitioner's request for a rehearing in banc was made by an overwhelming 9-2 majority. The 9-2 rejection of the rehearing request is just another indication of how clear the Fourth Circuit is on the issue raised by Petitioner.

Petitioner asserts that the Fourth Circuit's decision is in conflict with decisions of other federal appellate courts. Significantly, Petitioner finds only one decision by the Fifth Circuit in which the issue was mentioned. Petitioner admits in his Petition (at p.6) that preemption was not considered by the Fifth Circuit. Thus, the decision below is not in conflict with any case in which the issue of preemption was decided.

The case law concerning foreclosure of of a §1983 claim by virute of ADEA has not been fully developed by the circuits. The question presented in this case has rarely been raised or considered in the circuits. Petitioner seeks review by this Court for nothing less than an advisory opinion. It is too well established to cite that this Court does not give advisory opinions.

II.

THE PETITION FOR WRIT OF CERTIORARI SHOULD NOT BE GRANTED BECAUSE THE DECISION OF THE FEDERAL COURT OF APPEALS FOR THE FOURTH CIRCUIT WAS MADE IN ACCORDANCE WITH EXISTING STATUTES AND MERELY AFFIRMED THE CASE LAW EXISTING AT THE DISTRICT LEVEL.

The Fourth Circuit's decision was proper. Cases in the district courts concerning the foreclosure of § 1983 actions by ADEA have occasionally

arisen. The decisions of the district courts have consistently held that ADEA forecloses a §1983 suit. The Fourth Circuit's decision was consistent with the decisions of the district courts. See e.g., Platt v. Burroughs Corp., 424 F.Supp. 1329 (E.D. Pa. 1976); Ring v. Crisp County Hospital Authority, 652 F.Supp. 477 (M.D. Ga. 1987); McCroan v. Bailey, 543 F.Supp. 1201 (S.D. Ga. 1982); Morgan v. Humboldt County School District, 623 F.Supp. 440 (D.Nev. 1985); Chirstie v. Marston, 451 F.Supp. 1142; Frye v. Grandy, 625 F.Supp. 1573 (D. Md. 1986).

The Petitioner also claims that legislative history indicates that an equal protection claim is not preempted by ADEA. However, the plain language of ADEA is quite clear. As the majority

wrote in the decision below, "The provisions of this chapter shall be enforced in accordance with the powers, remedies and procedures provided in Section 211(b), 216 (except for subsection (a) thereof). . . 29 U.S.C. §626(b). Section 216 is a part of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§201, et seq., and it has been held that the statutory remedy of that Section is the sole remedy available to the employee for enforcement of whatever rights he may have under the F.S.L.A. Lerwill v. Inflight Motion Pictures Inc., 343 F.Supp. 1027 (N.D. Calif. 1972)." ADEA is the sole remedy for the enforcement of rights that Petitioner claims.

Petitioner attempts to make his personnel transfer a constitutional

issue. The court below explained that Petitioner's claim was non justiciable. The basic thrust of the decision explained the proper remedy for Petitioner's complaint. As part of the explanation, the Fourth Circuit discussed other situations in which a § 1983 claim would be heard along with other discrimination claims. The court clearly distinguished an ADEA claim from those other examples.

This case went to the Fourth Circuit as an appeal from a summary judgment decision of the district court. The district court addressed the merits of Petitioner's §1983 claims and found that the Petitioner's claims were insubstantial. (Pet. App. 34a). Petitioner never alleged facts that would support a §1983 claim. (Id.)

Thus, the Petitioner was defeated on the merits.

CONCLUSION

For the foregoing reasons, the Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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